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Via ECFS

October 30, 2019

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Broadband Deployment Advisory Committee*, GN Docket No. 17-83; *Wireline Infrastructure*, WC Docket No. 17-84; *Wireless Infrastructure*, WC Docket No. 17-79; *Rural Digital Opportunity Fund*, WC Docket No. 19-126; *Connect America Fund*, WC Docket No. 10-90

Dear Ms. Dortch:

On July 22, 2019, NCTA submitted a report from Dr. Michelle Connolly demonstrating that the pole attachment rates its cable members pay to municipal and cooperative electric utilities are more than double the rates they pay investor-owned utilities.[1] Dr. Connolly found that this disparity in rates cannot be explained by differences in economic costs and instead is attributable to municipal and cooperative utilities' exemption from Section 224 regulation.[2] Dr. Connolly further concluded that these excessive pole attachment rates deter broadband deployment in rural areas, a concern that is exacerbated where the municipal or cooperative electric is an actual or potential competitor in the broadband market.[3]

These findings comport with CenturyLink's experience attaching to municipal and cooperative poles in rural areas. In fact, CenturyLink pays even higher rates than cable attachers—$18.44 and $17.54 on average, respectively—to attach to municipal and cooperative poles.[4] This is more than two and a half times the $6.84 rate cable operators pay to attach to

[1] Letter from Steve Morris, Vice President & Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-83, WC Docket No. 17-84, and WT Docket No. 17-79 (Jul. 22, 2019), attaching Report by Michelle Connolly, PhD, *The Economic Impact of Section 224 Exemption of Municipal and Cooperative Poles*, at 13 (*Connolly Report*).

[2] *Connolly Report*, at 4.

[3] *Id.* at 28-36.

[4] In comparison, NCTA members pay average rates of $15.39 and $14.86, respectively, for access to municipal and cooperative poles. *Connolly Report*, at 3

investor-owned utility poles,[5] a rate to which CenturyLink and other ILECs are now presumptively entitled.[6] Further, these average rates obscure the wide variation of pole attachment rates charged by municipal and cooperative utilities. CenturyLink sometimes pays rates to cooperative or municipal utilities that are twice or even three times higher than these averages. Indeed, the American Public Power Association (APPA) has pushed a rate formula that typically results in rental rates more than triple the average CenturyLink pays to investor owned utilities applying the Commission's formula. Similarly, the rate created by the Tennessee Valley Authority for its associated providers seeks to increase the cost to attaching entities at least four-fold. These inflated charges have a significant impact in rural areas, given that service in those areas requires more poles-per-home-passed than in urban and suburban areas.

Unfortunately, these unchecked rates are only one of the problems arising from the municipal and cooperative utilities' exemption from Section 224. These utilities have repeatedly imposed unreasonable conditions on CenturyLink's access to their poles, delaying and driving up the cost of CenturyLink's broadband deployment.[7] Access to municipal and cooperative utility poles is often much slower, if available at all, than obtaining access to poles subject to the Commission's pole attachment rules. This has been a significant impediment to CAF II deployment, as municipal and cooperative utilities are the primary owners of poles in rural areas.[8] CenturyLink has repeatedly encountered long delays in seeking to attach CAF II-funded fiber facilities to municipal and cooperative utilities' poles. In some cases, CenturyLink's inability to obtain timely access to these poles has led it to instead bury its fiber facilities, at significant additional cost and delay, thereby depleting funds that otherwise could be used to bring service to those who need it most.

For example, last year CenturyLink sought access to poles owned by a cooperative utility in Colorado for a 15-mile fiber build necessary to deliver CAF II-supported broadband. After

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[5] *See id.* (finding that, nationally, investor-owned utilities charge cable operators an average annual rate of $6.84 per pole).

[6] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, and WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7767-68 ¶ 123 (2018), *appeals pending sub nom., City of Portland Oregon, et al. v. FCC*, No. 18-72689 (9th Cir. *pet. for rev. filed* Oct. 2, 2018) *(Accelerating Wireline Deployment Third Report and Order).*

[7] Comments of CenturyLink, WC Docket Nos. 19-126, 10-90, at 22-28 (filed Sept. 20, 2019) (CenturyLink RDOF Comments).

[8] According to the APPA, municipal utilities, which it refers to as "public power" utilities, provide electricity to 49 million people in 2,000 communities across the U.S. American Public Power Association website, https://www.publicpower.org/public-power/stats-and-facts (last visited Sept. 12, 2019). Cooperative utilities serve approximately 42 million people. National Rural Electric Cooperative Association website, https://www.electric.coop/our-mission/americas-electric-cooperatives/ (last visited Oct. 9, 2019).

approving about a quarter of the attachments for the deployment, the cooperative refused to process any additional attachments until CenturyLink addressed demands unrelated to its pole attachment application. After months of unsuccessful attempts to resolve these issues, CenturyLink was forced to scrap its plan to attach to the cooperative's poles and instead bury the fiber facilities through rocky, mountainous terrain at considerable additional expense. The added cost of a buried deployment (at nearly ten times the cost of pole-mounted fiber) shortened the build and reduced the ultimate number of homes served with advanced services.

Such coercive tactics would be prohibited by the Commission's pole attachment rules if they applied to this utility. In fact, the Commission recently issued a complaint decision confirming this principle.[9] In that case, PPL Electric had refused to process a telecommunications carrier's pole attachment application because of alleged non-payment of monies in dispute and claims of unauthorized attachment. The Commission concluded that PPL's "refusing to act on the pending applications on this basis is a denial of access that violates rule 1.1403(a), since the refusal to act is not based on capacity, safety, reliability, or engineering concerns."[10] It therefore "order[ed] PPL immediately to respond to th[e]se applications" in the manner prescribed by the Commission's rules.[11] Unfortunately, given the Section 224 exemption, CenturyLink has not been able to invoke such regulatory action to address the Colorado cooperative's refusal to process CenturyLink's CAF II-related pole attachment applications.

CenturyLink encountered similar roadblocks with a municipal utility in Washington while deploying CAF II services. Like the Colorado cooperative, this municipal utility conditioned approval of CenturyLink's pole attachment applications on its agreement to other unrelated and longstanding demands, such as disputed claims that CenturyLink is unlawfully attached to certain municipal utility poles. Further complicating this situation, the city inspector in that municipality has become involved in attempting to enforce the municipal utility's claims. Worse still, the municipal utility is affiliated with a competing fiber-based broadband provider operating in the city, making the municipal utility's conduct also blatantly anticompetitive. Two other municipal utilities in Washington similarly held hostage CenturyLink's CAF II-related pole attachment applications based on unrelated demands. In one of those cases, CenturyLink ultimately had to bury its fiber facilities to meet its CAF II deployment commitments. In total, the municipal utilities' tactics in Washington have delayed broadband builds to more than 20,000 customers.

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[9] *MAW Communications, Inc. v. PPL Electric Utils. Corp.*, EB Docket No. 19-29, File No. EB-19-MD-001, Memorandum Opinion and Order, DA 19-7711, 2019 FCC Lexis 2225 (2019) (*MAW Communications Order*).

[10] *Id.* at ¶ 16. Rule 1.1403(a) requires a utility to provide "a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it . . . [except] where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." 47 C.F.R. § 1.1403(a).

[11] *MAW Communications Order* ¶ 1.

Absent regulatory oversight, municipal and cooperative utilities will maintain other unreasonable practices that inflate the cost of deployment in their service territories. For example, utilities sometimes rely on expensive audit and attachment correction programs to rebuild their plant at the cost of attaching entities. A cooperative utility in New Mexico terminated CenturyLink's joint use agreement and demanded a new pole license agreement. A hallmark of the new contract is an upfront total system audit—substantially at CenturyLink's cost. One of the apparent intended outcomes of the audit is to require existing and longstanding attachments made at aboveground level heights consistent with prior versions of the National Electrical Safety Code (NESC) to be raised to current, higher NESC requirements. In this rural territory, where many of the attachments run along stretches of empty land, moving the lines to the new height will require the same for all poles along the route. These attachments, and the poles supporting them, have been in place for decades. In the normal course of events, the pole owner should replace these poles due to their age and condition. Instead, the cooperative is poised to demand pole replacement by CenturyLink at a cost of millions of dollars in order to remedy a ground clearance condition that is not a safety issue, and that is specifically within the grandfathering clause of the NESC. Here the cooperative seeks a windfall of all new poles for tens of miles—at the sole cost of CenturyLink.

Unreasonable rates, terms, and conditions for access to municipal and cooperative utility poles have persisted due to the absence of meaningful regulatory oversight at the federal, state, and local levels. Federal legislative reform is urgently needed to remove the outdated exemption of municipal and cooperative utilities from Section 224. Dramatic changes in market conditions since 1977, when the exemption was adopted, clearly warrant this change.[12] In particular, municipal and cooperative utilities increasingly are competing (either directly or through joint ventures with favored vendors) in telecommunications markets and aggressively seeking government subsidies to do so. Under these circumstances, the public interest demands that the poles owned by cooperative and municipal utilities be subject to the same regulatory regime that applies to competing utilities.

Even absent legislative reform, the Commission can begin to address these obstacles to broadband deployment. As it has done in other contexts,[13] the Commission should exercise its

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[12] *See* Reply Comments of CenturyLink, WC Docket No. 17-84, at 3 (filed Jul. 17, 2017) ("In short, Congress in 1977 expected that no local power provider would price gouge a local cable television or communications provider because the parties' customers were essentially the same local citizens and none of the companies (power, cable, telephone) were in competition with one another.") (CenturyLink Wireline Infrastructure Reply Comments).

[13] *See, e.g.*, *Accelerating Wireline Deployment Third Report and Order*, 33 FCC Rcd 7705 (concluding that state and local moratoria on telecommunications services and facilities are barred by Section 253(a)); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*; *Accelerating Wireline Deployment By Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 and WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 30 FCC Rcd 9088 (2018), *appeals pending sub nom., Sprint Corp.,*

Section 253 authority to identify pole attachment rates and practices of utilities associated with municipalities that "prohibit or have the effect of prohibiting" the ability of entities to provide telecommunications services.[14] This standard is clearly met when a municipal utility refuses to process an application to access the utility's poles due to an unrelated demand. As CenturyLink has previously noted, any distinction between a municipality's "proprietary" function of providing electric service and its governmental functions is illusory, as municipal utilities routinely refuse contractual indemnification provisions and require blanket sovereign immunity because of their status as governmental entities and are staffed by city employees. Moreover, municipalities sometimes coordinate the activities of their inspectors and permitting officers to favor their affiliates.[15]

As the Commission has recognized, "swift, predictable, safe, and affordable" pole access is essential to the race to 5G, as well as fiber optic cable deployment, "because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul."[16] Thus, exercise of the Commission's Section 253 authority is necessary to effectuate the Commission's goals of advancing both wireline and wireless service expansion.

When municipal and cooperative utilities enter telecommunications markets, as many are doing,[17] it is even more imperative that they offer just, reasonable, and nondiscriminatory access to their poles. Basic fairness and competitive neutrality require that these utilities fulfill the same public interest obligations as their competitors. This is especially true when these entities seek government subsidies, such as in the RDOF auction. The Commission should require all auction participants, including municipal and cooperative electric utilities, to commit to provide just, reasonable, and nondiscriminatory access to their poles on rates, terms, and conditions consistent with the Commission's pole attachment rules. When electric utilities voluntarily provide telecommunications, particularly via public funding, it is reasonable and appropriate for these

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et al. v. FCC, No. 19-70123 (9th Cir. *pet. for rev. filed* Jan. 14, 2019) (clarifying its standard for determining whether a state or local law operates as an effective prohibition, within the meaning of Sections 253 and 332).

[14] 47 U.S.C. § 253.

[15] CenturyLink Wireline Infrastructure Reply Comments, at 10-11.

[16] *Accelerating Wireline Deployment Third Report and Order*, 33 FCC Rcd at 7706 ¶ 1.

[17] According to the National Rural Electric Cooperative Association (NRECA), more than 100 of its 900 members currently provide broadband service and another 200 are exploring the option and conducting feasibility studies to do so. *See* Letter from Jim Matheson, CEO, NRECA, to Ajit Pai, Chairman, FCC, GN Docket No. 17-83, WC Docket No. 17-84, WT Docket No. 17-79 (Jun. 10, 2019), attaching *Rural Electric Cooperatives: Pole Attachment Policies and Issues*, at 2.

utilities to commit to the same public interest obligations that apply to their wireline telecommunications competitors.[18]

At a minimum, any municipal or cooperative utility that wins RDOF support (or partners with such an entity) should be required to commit to provide access to their poles consistent with the Commission's pole attachment rules. In this situation, the municipal or cooperative utility is essentially stepping into the shoes of, and potentially displacing, the ILEC in that area. Indeed, the ILEC may seek authority to discontinue service in that area, recognizing the difficulty of competing against a government-funded competitor. In that case, the municipal or cooperative utility may be the only pole owner in that area. Without a requirement for that party to provide just, reasonable, and nondiscriminatory access, competitors will encounter high rates and the coercive practices that CenturyLink experienced when deploying CAF II. Such unreasonable terms may have a particularly negative effect on 5G deployment, which depends on terrestrial fixed networks,[19] and requires deployment of large numbers of small-cell antennas. In rural areas, those antennas are likely to be attached to poles, given the sparseness of other structures. But that assumes the availability of just, reasonable, and nondiscriminatory access to those poles, which is unlikely to occur without a commitment to comply with the Commission's pole attachment rules.

Until Congress undertakes needed legislative reform to remove Section 224's outdated exemption of municipal and cooperative electric utilities, it is essential that the Commission exercise the full extent of its authority to mitigate the harms to broadband and 5G deployment arising from unreasonable rates, terms, and conditions for accessing space on these utilities' poles.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this notice is being filed in the above-referenced docket.

Sincerely,

/s/ Craig J. Brown

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[18] *See* CenturyLink RDOF Comments at 22-28 ; Comments of ITTA – The Voice of America's Broadband Providers, WC Docket Nos. 19-126, 10-90, at 22-23 (filed Sept. 20, 2019); Comments of Sacred Wind Communications, Inc., WC Docket Nos. 19-126, 10-90, at 4-6 (filed Sept. 20, 2019); Reply Comments of AT&T Services, Inc., WC Docket Nos. 19-126, 10-90, at 18-19 (filed Oct. 21, 2019).

[19] *See Rural Digital Opportunity Fund; Connect America Fund*, WC Docket Nos. 19-126, 10-90, Notice of Proposed Rulemaking, FCC 19-77 (rel. Aug. 2, 2019); 84 Fed. Reg. 43543 (Aug. 21, 2019) (RDOF NPRM) at ¶ 25.